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No. 07-159

In the Supreme Court of the United States

CITY OF NEWPORT NEWS, VIRGINIA, ET AL.,

Petitioners,

v.

CHRISTOPHER A. SCIOLINO,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC., NATIONAL LEAGUE OF CITIES, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND VIRGINIA ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments from across the United States.[1] International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization that consists of more than 1,400 local governments, including cities, counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. International Public Management Association for Human Resources ("IPMA-HR") represents the interests of human resource professionals at the federal, state and local levels of government. Local Government Attorneys of Virginia, Inc. ("LGA") is a nonprofit, professional corporation whose members represent 145 localities, including counties, cities, and towns located throughout Virginia. Among other activities, LGA participates in litigation that, in the judgment of LGA, is significant to local governments. National League of Cities ("NLC") is the country's largest and oldest organization serving municipal government, representing more than 19,000 United States cities and towns. NLC strengthens local government through advocacy, research, and information sharing on behalf of hometown America. National Public Employer Labor Relations Association

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

("NPELRA") is a nonprofit association representing 3,000 labor-relations and personnel professionals who work on behalf of states, counties, cities, schools, and special governmental districts throughout the United States. Virginia Association of Counties ("VACo") is a nonprofit, statewide, independent association organized in 1934 to support county officials and to effectively represent, promote, and protect the interests of counties to better serve the people of Virginia. VACo's membership includes all 95 Virginia counties.

This case involves the relationship between public employers and their probationary employees. As explained in this brief, state and local governments rely heavily on probationary employment as integral to the selection of tenured employees. *Amici* therefore have a vital interest in the decision below, which would effectively create a right to a hearing at the time of a probationary employee's dismissal. Because of the importance of this issue to *amici* and their members, *amici* support the Petitioners' request that the Court grant certiorari in this case.

SUMMARY OF ARGUMENT

This case is about whether *Bishop v. Wood*, 426 U.S. 341 (1976), means what it says. In *Bishop*, the Court held that a terminated employee has no right to a name-clearing hearing unless allegedly-stigmatizing information about the employee is "made public." *Id.* at 348. In the decision below, the Fourth Circuit altered this "made public" requirement by holding that it can be met by a showing of "likely disclosure": by the mere *potential* for disclosure at some future date. Pet. App. at 9a.

This decision, if permitted to stand, would subject thousands of government entities to a new

constitutional obligation with respect to their own employees: holding a name-clearing hearing every time a probationary employee is terminated for a reason that would be stigmatizing if it were disclosed. (The right to a name-clearing hearing most directly affects probationary employees because, unlike many permanent employees, they do not otherwise receive a hearing to appeal a discharge.) *Amici* support the Petitioners' view that *Bishop* in fact does mean what it says: An employee is not entitled to a hearing unless the reason for termination is "made public."

I. In the experience of *amici*, the likely-disclosure rule ignores the practical realities of administering public employment systems. Thousands of state and local government entities rely on probationary periods to screen employees before offering them permanent employment, but the likely-disclosure standard substantially reduces the value of probationary employment. This new standard compels public employers to conduct a substantially greater number of hearings. It also subjects them to much more parallel litigation, such as whether future disclosure of employee information is "likely"; whether the reasons the employee was terminated are "stigmatizing"; and whether any procedure the employer does provide passes the balancing test that governs the sufficiency of constitutionally required procedures.

This increase in costs is unnecessary. The terms of probationary employment already have been addressed by state legislators, by other state and local officials, and in many cases by public-employee unions. These actors have worked out satisfactory balances based on factors that they are best situated to evaluate. Among these factors are exist-

ing incentives to provide a hearing at the time a probationary employee is terminated if there is a sufficiently high risk that the decision is wrong and the stigmatizing information will become public.

II. Review is warranted for the additional reason that the decision below does damage to legal principles that are important to state and local governments. First, by deepening a split that involves at least eight circuits, it helps to foster substantial uncertainty and geographical inconsistency about the constitutional obligations of state and local governments.

Second, the decision below slights three important constitutional doctrines. The first is *Bishop's* bright-line limitation on the liberty interests of probationary employees. By giving probationary employees the right to a hearing whenever they can predict that this information will be disclosed at some later date, the decision below substantially expands the constitutional obligations of public employers.

The likely-disclosure approach also would work a substantial revision of the Article III standing requirement. Instead of requiring actual injury, as mandated by this Court's precedents, the new approach recognizes a claim based on a mere *prediction* of future disclosure. This weakens a limitation on lawsuits that is important to state and local governments, who are vulnerable to many kinds of litigation.

The likely-disclosure approach also weakens principles of federalism. By establishing that the legislative and policy choices of state and local governments can be overridden without a concrete constitutional justification, it violates the principle of

deference to state and local governments about the management of their own employees.

REASONS FOR GRANTING THE PETITION

I. PROBATIONARY STATUS – WITHOUT A CONSTITUTIONAL RIGHT TO A HEARING UPON TERMINATION – IS OF GREAT PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENTS

A. State And Local Governments Rely Heavily On Probationary Status To Evaluate Candidates For Tenured Employment

There are more than 87,000 state and local government units in the United States. U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS 1 (2002), available at http://tinyurl.com/2qpacf. Many of these units are quite small. In all, about 62,000 of these units employ fewer than 25 employees. U.S. CENSUS BUREAU, COMPENDIUM OF PUBLIC EMPLOYMENT 248 Table 20 (2004) (available at http://tinyurl.com/2jfjkf).

Local governmental entities make widespread use of probationary employment. See ROBERT H. ELLIOTT & ALLEN L. PEATON, THE PROBATIONARY PERIOD IN THE SELECTION PROCESS: A SURVEY OF ITS USE AT THE STATE LEVEL 51 (1994); see also Appendix A (listing state statutes providing for probationary employment in all 50 states and Washington, DC). The same is true of the federal government. See 5 U.S.C. § 3321 (authorizing probationary status in federal employment); 5 C.F.R. § 315.801 (estab-

lishing probationary period for competitive federal positions).

Probationary status is an efficient means of evaluating an applicant for permanent employment before granting the substantial protections of civil-service status. "[T]he probationary period is the last stage in the screening process; no matter how much effort is put into making pre-employment tests valid, they may not screen out some applicants who actually lack the ability, motivation, or work habits needed to perform satisfactorily in particular jobs." LLOYD G. NIGRO ET AL., THE NEW PUBLIC PERSONNEL ADMINISTRATION 110 (6th ed. 2007). Therefore, "[u]ntil the probationary period has been completed, a probationer is still an applicant for employment." U.S. MERIT SYSTEMS PROTECTION BOARD, THE PROBATIONARY PERIOD: A CRITICAL ASSESSMENT OPPORTUNITY i (2005). See also ERICA L. GROSHEN & ENG SENG LOH, WHAT DO WE KNOW ABOUT PROBATIONARY PERIODS?, *in* FORTY-FIFTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES 10-11 (1993) (discussing the use of probationary periods, or "post-hire evaluation periods").

Once a probationary employee successfully completes a probationary period, the employee usually receives the "relative security of tenure" provided by civil-service status. NIGRO at 236; see also *id.* at 27 (noting the origins of civil-service protections). An initial probationary period "gives supervisors the chance to evaluate new employees' situations and to approve for permanent status only those who have done satisfactory work." *Id.* at 110.

Governments value probationary status because it allows them to bring applicants into the workplace, and make decisions about permanent

employment, without the kind of hearing that is required to show "cause" to dismiss tenured civil servants. "If awkward or inappropriate placements need to be remedied, this period is the easiest time for management" because "management does not have to prove its case, as it does when the employee has passed probation and is on permanent status." ELLIOTT & PEATON, *supra*, at 48 (internal quotation marks omitted). As the United States Merit Protection Board explained, "[i]n the case of new-hire probationers, the public interest is served by limiting certain rights, including the right to appeal an adverse action. These limitations ensure that agencies can promptly and effectively act upon their assessments of probationers." U.S. MERIT SYSTEMS PROTECTION BOARD, THE PROBATIONARY PERIOD: A CRITICAL ASSESSMENT OPPORTUNITY i-ii.[2]

B. The Likely-Disclosure Standard Substantially Increases The Cost And Decreases The Usefulness Of Probationary Status

Against this background, requiring employers to provide name-clearing hearings based only on likely disclosure would be costly and counterproductive. The opinion below brushed aside these costs, see Pet. App. at 12a (stating that the lowered threshold would impose no "enormous costs" (internal quotation marks omitted)), but they are substan-

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[2] Federal probationary employees generally are not entitled to a hearing in connection with dismissal for work performance or conduct. *See* 5 U.S.C. § 7511(a)(1)(A); 5 U.S.C. § 7513(c); 5 C.F.R. § 315.806. See also *Christian v. New York State Dep't of Labor, Div. of Employment*, 414 U.S. 614, 619 n.4 (1974) ("a probationary federal employee has no right to appeal a discharge").

tial. Adoption of the likely-disclosure standard effectively imposes a constitutionally required unfunded mandate on public employers—a mandate that is especially unfair because state and local governments are powerless to change it.

1. The likely-disclosure standard subjects governments to substantially higher costs

As we now explain, the cost is the result of an increase in the number of hearings and an increase in the amount of parallel litigation.

a. The likely-disclosure standard would require employers to provide many more hearings than are required under the actual-disclosure standard. Under *Bishop*, a right to a hearing does not arise unless the information at issue is disclosed. Under the likely-disclosure standard, however, the right to a hearing arises as soon as the information comes into existence and the employee alleges that future disclosure is likely—regardless of whether the information ever is disclosed.

These additional hearings are expensive. As this Court has recognized, all due process guarantees come at a substantial cost in dollars and inefficiency. See, *e.g.*, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 59 (2005) (noting that administrative hearings involving special-education program would cost $8,000 to $12,000 each). Although cost will vary with the amount of procedure required, every name-clearing proceeding requires agency employees to take time away from the tasks for which they were hired. Proceedings generally involve participation by employees with knowledge of the underlying facts, and by employees who made and approved the termination decision. Proceedings often require attor-

ney time as well, to monitor less formal proceedings or to participate in more formal ones.

b. In addition to the cost of the additional hearings, the new standard also would impose other litigation costs. Unless employers provide hearings to every former employee who seeks one, employers also must litigate some of those requests. The likely-disclosure standard would bring several vague standards into play every time a probationary employee is terminated. This invites a substantial increase in lawsuits, because "[u]ncertainty breeds litigation." *Bd. of County Comm'rs, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 698 (1996) (Scalia, J., dissenting).

i. The first vague standard is the likely-disclosure test itself. Where the actual-disclosure test is sharp, the word "likely" is so vague that its meaning cannot be stated in advance, but "will vary with the circumstances of each case," as the Second Circuit acknowledged. *Brandt v. Bd. of Co-op. Educ. Servs.*, 820 F.2d 41, 44 (2d Cir. 1987).

This vagueness makes suing easier for disappointed probationary employees, because it invites them to litigate the meaning of "likely" threshold. They will, of course, try to push that threshold as low as possible. This vagueness also breeds general unfairness, because it leads to inconsistency in the conclusions reached by different courts that apply the standard. And it makes planning harder for state and local governments, because it does little to tell them when they must provide hearings at the time of termination, or how they can defend themselves once they are sued.

ii. All of this uncertainty is compounded by the amorphous "stigmatizing" standard requirement.

As Judge Wilkinson noted in his dissent, "[a]dverse personnel actions are by definition taken on the basis of unfavorable assessments." Pet. App. at 28a (Wilkinson, J., dissenting). Especially when combined with the vagueness of the "likely" standard, the "stigmatizing" standard invites disappointed probationary employees to transform garden-variety selection decisions into constitutional litigation.

c. Public employers cannot avoid litigation even by conceding the likely disclosure and "stigmatizing" issues, and providing a name-clearing opportunity to every employee who requests it. An employee can simply challenge the sufficiency of that opportunity, forcing the employer to litigate that issue as well. And the sufficiency of procedure is governed by yet another fuzzy standard, the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), so that it is difficult, at best, for an employer to predict what level of procedure a court will find sufficient. See Pet. App. at 27a-28a (Wilkinson, J., dissenting). Again, this case illustrates the problem. On a motion to dismiss, the courts below could not resolve whether the procedure that Newport News did provide to Sciolino at the time of his termination was constitutionally sufficient. See *Sciolino*, Pet. App. at 4a n.1.

Nor should employers be forced to provide a hearing to every former probationary employee who demands one. Engaging in overcompliance might be prudent management, because it errs on the side of avoiding litigation over whether future disclosure is "likely." But it is wasteful, because it results in needless costs for thousands of government employers. Worse, it aggravates the insult to federalism: Where the likely-disclosure standard already slights federalism by imposing a constitutional requirement

based on a mere prediction of future disclosure, over-compliance extends that new requirement to cover *all* terminated probationary employees, whether or not future disclosure is likely.

d. Under the likely-disclosure test, the act that triggers all of this litigation is the employer's documentation of its reason for terminating a probationary employee. But documenting personnel decisions benefits both employees and employers, because it increases the accuracy of evaluations and discourages arbitrary decisions. It benefits public employers, and taxpayers, for the additional reason that it enables employers to defend against the claims that inevitably arise from negative personnel decisions. See *Sciolino,* Pet. App. at 28a (Wilkinson, J., dissenting) (observing that the threat of suit for unlawful discrimination "leaves governments with little choice but to document the reasons for major personnel actions").

This same documentation, however, immediately subjects these employers to due-process claims and related litigation. Under the likely-disclosure test, employers cannot escape this bind even in cases where the negative information will never be distributed beyond the employer. This imposes an unfair Hobson's choice on state and local governments.

Placing employers in this bind does nothing to help employees. To the contrary, it discourages employers from telling terminated probationary employees why they failed to achieve permanent status. At least one expert already recommends that employers follow this course. See JOHN E. SANCHEZ & ROBERT D. KLAUSNER, STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY § 1.11 (2007) (recommending that governmental employers "not make

any personnel file entries containing 'cause' for removal" of provisional employees).

e. The likely-disclosure standard more generally disadvantages probationary employees, current and future, by increasing the costs of probationary employment. This encourages employers to substitute pre-probationary screening devices such as testing. But testing presents its own problems; some public-employee unions criticize it as discriminatory, see RICHARD C. KEARNEY & DAVID G. CARNEVALE, LABOR RELATIONS IN THE PUBLIC SECTOR 197 (3d ed. 2001), and it may be less valid than probationary employment in identifying applicant ability, see ELLIOTT & PEATON, *supra*, at 48. Indeed, the higher costs created by the new standard create incentives for employers to reduce the availability of probationary employment altogether. For potential probationary employees, this reduces the availability of an important means of access to public employment.

2. The likely-disclosure standard decreases the usefulness of probationary status

So the likely-disclosure rule requires more hearings, generates more litigation, and infuses routine record-keeping with new constitutional risks. As a practical matter, these changes require responsible public employers to show some cause for terminating probationary employees, or to risk serious and unpredictable legal consequences. That is why, as Judge Posner explained, advocating the "likely" standard "comes close to arguing that there is no such thing as probationary public employment—that no public employee can be fired without a hearing because if he is, and the ground of the discharge impugns his fitness for employment in a similar job, as

it very often will, his employer will have violated his constitutional rights, no matter how secretive the employer is about the ground." *Olivieri v. Rodriguez*, 122 F.3d 406, 409 (7th Cir. 1997). The First Circuit expressed the same view in *Brennan v. Hendrigan*, 888 F.2d 189, 196 (1st Cir. 1989) ("[t]o require it would simply erase in many instances the constitutional distinction between the 'at will' and the 'tenured' employee" (internal quotation marks omitted)).

C. State And Local Employers Already Have Sufficient Incentives To Protect The Interests At Stake

Even if the likely-disclosure rule did not place such heavy burdens on state and local governments, it could not be justified. A new rule is simply unnecessary. As Judge Wilkinson pointed out, public employers already have the incentive to require hearings in appropriate cases. Pet. App. at 32a (Wilkinson, J., dissenting). Because of the existing *Bishop* requirement for a hearing upon actual disclosure of the disputed information, a public employer that terminates a probationary employee already must consider the likelihood that a hearing will be required at some later time. This likelihood depends on, for example, the probability that the employee might assert that the reasons for the dismissal are stigmatizing, and the probability that the disputed information will be disclosed to a potential employer. The employer also must consider any increased cost due to deferring a second look at the relevant information to a later time, when memories are not as fresh and assembling the record is more expensive.

The employer's decision is affected by other incentives as well. In particular, many public employers are already subject to defamation claims if they

provide false information to prospective employers. See, *e.g.*, *McQuirk v. Donnelley*, 189 F.3d 793, 799 (9th Cir. 1999) (action for defamation available under California law against county sheriff who allegedly provided a negative job reference for employee); *Stratman v. Brent*, 683 N.E.2d 951, 957 (Ill. App. Ct. 1997) (action for slander available under Illinois law against police chief who allegedly provided negative job reference for former officer); Virginia Code § 8.01-46.1 (withdrawing immunity in defamation cases from employers who disseminate false information about employees). In addition, public employers who discriminate can be sued under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.*

Taken together, these incentives force public employers to take into account the costs of placing false information in the files of former employees. This calculus, performed at the local level by thousands of governmental units across the country, necessarily takes into account the probability that the information is stigmatizing, is wrong, and will be disclosed to a third party. As Judge Wilkinson explained, "[l]eaving the analysis to democratically responsive local authorities * * * makes it possible to strike balances suited to local needs and facilitates adaptation to changing circumstances and new insights." Pet. App. at 26a. The thousands of governmental entities across the country are better situated than a single court to determine when a hearing is the most effective means for vindicating the values advanced by the rules that already govern the relationship between state and local governments and their employees.

II. THE DECISION BELOW UNDERMINES CONSTITUTIONAL DOCTRINES THAT ARE IMPORTANT TO STATE AND LOCAL GOVERNMENTS

The decision below also warrants review because of its effect on the law: It aggravates the existing split among the circuits, and it weakens important constitutional principles.

A. A Persistent Circuit Split Engenders Inconsistency In The Constitutional Obligations Of State And Local Governments

Because state and local governments make such extensive use of probationary status, any applicable constitutional requirements should be clear and uniform. With respect to the right to a name-clearing hearing at the end of probationary employment, however, the law varies across the circuits. The circuit split is discussed in detail in the Petition for Writ of Certiorari filed by the City of Newport News, at 12-13.

The Court should resolve this split. The discord among the circuits engenders uncertainty about the constitutional obligations of thousands of state and local governments. It also perpetuates geographic inconsistency, with obligations varying based on the circuit in which a state or local employer is located. Dispelling this uncertainty and restoring uniformity in the law warrant this Court's intervention.

B. The Likely-Disclosure Standard Substantially Alters Important Constitutional Doctrines

The decision below also weakens constitutional principles in three areas that are important to state and local governments.

1. The likely-disclosure standard expands employee due-process rights beyond the limits set by this Court

a. The first area is the clear limitation that this Court placed on the liberty interests of probationary employees. *Bishop* established that an employee's liberty interests do not come into play unless stigmatizing information about the employee is "made public." 426 U.S. 341, 348. But the decision below holds that those interests are affected as soon as an employee predicts that stigmatizing information is likely to be disclosed in the future.

b. This is a significant expansion of employee due-process rights and, in equal measure, of the constitutional obligations of public employers. Simply put, the decision below holds that a bright line "public-disclosure" requirement is met by no disclosure at all. Worse, it bases that conclusion on a concern that this Court already has rejected. At the heart of the decision below is the concern that stigmatizing information contained in an employee's file might chill that employee's job search. According to the majority, the employee would not want to "risk[] the release of the stigmatizing allegations" to potential employers. Pet. App. at 9a. *Bishop*, however, considered and rejected this argument. See 426 U.S. at 348-349. Indeed, two *dissenting* justices (Justices Brennan and Marshall) would have required a hearing because of exactly that concern. See *id.* at 352, 353 n.2 ("there is no reason to believe that [the former employer] will not convey the[] actual reasons [for the dismissal] to [the employee's] prospective employers," because "[i]t is only common sense, to be sure, that prospective employers will inquire as to petitioner's employment * * * .").

c. This expansion of constitutional obligations in the context of probationary employees has broader implications for state and local governments. The creation of a constitutional right based on a plaintiff's *prediction* about the future exposes state and local governments to litigation wherever plaintiffs can complain that some possible, predicted government action has a present chilling effect on them. In light of the widespread, varied activities of state and local governments, the range of potential claims is enormous.

2. The likely-disclosure standard lowers the threshold for standing to sue state and local governments

a. The expansion of employee liberty interest claims also requires alteration of the Court's limitations on standing. The decision below gives former probationary employees standing to sue based only on a prediction of potential injury, but "[t]he Constitution does not give courts the power to predict future harms and declare the Constitution violated before the possible harms transpire." Pet. App. at 23a (Wilkinson, J. dissenting). This is because "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct * * * ." See also *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (collecting cases).

b. This limitation is important because it ensures that the courts intervene only in "live dispute[s]." *Anderson v. Green*, 513 U.S. 557, 559

(1995); see discussion in *Lujan*, 504 U.S. at 559-560. It is especially important to state and local governments, because it reduces the number of federal-state confrontations. In this vein, this Court recently explained the importance of the standing requirement in preventing federal courts from becoming "virtually continuing monitors of the wisdom and soundness of state fiscal administration," *Daimler-Chrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1864 (2006) (citations and internal quotation marks omitted) (holding that state and municipal taxpayers lacked standing to press a Commerce Clause challenge to certain state and municipal tax provisions).

The standing requirement thus protects the principle of federalism from needless encroachment. It also protects state and local governments, which are conspicuously inviting litigation targets, from claims based on plaintiffs' predictions of *future* state action. The likely-disclosure standard substantially reduces this protection.

3. The likely-disclosure standard shrinks the zone of federal deference to state and local governments with respect to management of their own employees

a. The likely-disclosure standard also would alter the boundaries that "sound principles of federalism and the separation of powers" place on "permanent judicial intervention in the conduct of governmental operations." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961 (2006). It would mandate exactly what this Court recently ruled out in *Garcetti*: "judicial oversight of communications between and among government employees and their superiors in the course of official business." *Id.* at 1961.

The Court has repeatedly affirmed the importance of these boundaries in the area of public employment. In *Bishop* itself, the Court cautioned that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," 426 U.S. at 349, and rejected the "far-reaching view that almost every discharge implicates a constitutionally protected liberty interest," *id.* at 350 n.14. Again in *Connick v. Myers*, 461 U.S. 138, 146 (1983), the Court reiterated that government officials should normally "enjoy wide latitude in managing their offices," so that "ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." (citations omitted).

b. The decision below erases these boundaries by constitutionalizing a new element of the public employment relationship based only on the *potential* disclosure of employee information. It requires no actual injury—no concrete constitutional stake. This new encroachment is, therefore, unjustified.

This expansion also is open-ended, because it extends the constitutional right beyond its putative support in underlying state tort law. The Court has warned that, although a liberty interest exists to protect an "independent source [of interests] such as state law rules," *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), constitutional liberty interests do not extend as far as state tort law: A liberty interest is not "invaded" every time the government violates state tort law. *Paul v. Davis*, 424 U.S. 693, 700 (1976). After all, respect for the underlying limits of state-law is the reason a probationary em-

ployee is limited to a liberty interest in the first place; out of respect for the state-law meaning of employment-at-will, the Constitution does not recognize a property interest in probationary jobs. *Bishop,* 426 U.S. at 343-347. Yet the decision below extends constitutional liberty interests *beyond* underlying state law. It creates a liberty interest where the employee has no underlying state-law interest. See, *e.g.*, *Jackson v. Hartig*, 645 S.E.2d 303, 307 (Va. 2007) (noting that publication is required for a defamation claim).

c. The new rule further erodes the limits dictated by principles of federalism because it imposes this new constitutional rule in an area that receives the attention of numerous actors, including state legislatures, local lawmakers, and other officials, as well as public-employee unions. All 50 state legislatures have addressed probationary periods. See Appendix A. In many jurisdictions, local entities or officials adopt additional policies. See ELLIOTT & PEATON, *supra* at 52 (summarizing source of probationary status in legislation and in policy statements). Still further input often comes from the collective bargaining process. Most states provide public employees with collective-bargaining rights,[3] and "[a]pproximately 31 percent of state and 43 percent of local government workers belong to unions," ANN BOWMAN & RICHARD C. KEARNEY, STATE AND LOCAL

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[3] See U.S. GEN. ACCOUNTING OFFICE, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS 8-9 & n.14 (2002) (stating that "26 states and the District of Columbia * * * provide collective bargaining rights to essentially all employees" and "12 states have laws that provide bargaining rights to specific groups of workers," while employees in other states "may be covered by local laws").

GOVERNMENT 228 (6th ed. 2005). These unions often bargain over the use and terms of probationary status.[4]

Because of this variety of decision makers, the terms of probationary employment vary significantly by job category and governmental entity. See, *e.g.*, 3 MCQUILLIN MUN. CORP. § 12.81 (3d ed.) (collecting examples). The most basic condition is the length of the required probationary period, which ranges from as short as six months to as long as three years. See ELLIOTT & PEATON, *supra*, at 48, 52, 57. Various public employers also differ over whether probationary employees are entitled to hearings upon termination. Probationary employees typically can be let go without cause, but some public employers do provide hearings upon dismissal. See ELLIOTT & PEATON, *supra*, at 53 (noting that a few states provide probationary workers some measure of appeal rights); *Byrn*, 1991 WL 7806, at *8 (under collective-

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[4] See, *e.g.*, *Somers v. City of Minneapolis*, 245 F.3d 782, 787 n.5 (2001) (where collective bargaining agreement ("CBA") lengthened the statutory probationary period, the court stated, "We suspect there are good reasons for negotiating a longer probationary period for some types of jobs, but in any event it was the union's prerogative to do so."); *Moore v. County of Cook*, 2000 WL 989618, at *2 (7th Cir. June 12, 2000) (CBA reduced probationary period from six to three months); *Anderson v. City of Massillon*, 1999 WL 174851 (Oh. App. Feb. 22, 1999) (CBA prohibited administrative appeal of termination of probationary employees); *Byrn v. Metro. Bd. of Pub. Educ.*, 1991 WL 7806, at *8 (Tenn. Ct. App. Jan. 30, 1991) ("State law, however, is not the only source of a non-tenured teacher's rights. The board employing the teacher may, by contract, create and establish additional rights. This is precisely what the collective bargaining process * * * is all about.").

bargaining agreement, probationary employees are entitled to a hearing upon dismissal).

The majority's approach overrides the arrangements reached by the diverse state and local actors. It denies these actors the power to work out, in thousands of local contexts, the most appropriate relationships between public employers and their own employees. The majority's approach conflicts with this Court's teaching that "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs," *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring), and unduly reduces the states' ability to act as laboratories of democracy. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

* * *

In sum, the decision below undercuts several constitutional doctrines that, taken individually and together, provide important protections to state and local governments: the requirement for actual disclosure before a terminated probationary employee obtains a cognizable liberty interest; the requirement for actual harm before a plaintiff has standing to sue; and the requirement for deference to state and local government personnel practices in the absence of any harm that justifies intervention. Preserving the clarity and vigor of these important doctrines warrants review of the decision below by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 9, 2007

APPENDIX

APPENDIX A: SAMPLE OF GENERAL AND SPECIFIC STATE LAWS ON PROBATIONARY EMPLOYEES

Alabama	ALA. CODE § 36-26-101 (school employees); ALA. CODE § 11-43-188 (law enforcement employees)
Alaska	ALASKA STAT. § 39.25.150(7)
Arizona	ARIZ. REV. STAT. ANN. § 41-783 (8)
Arkansas	ARK. CODE ANN. §§ 14-49-304(b)(7) (municipal employees); § 14-50-304(b)(7) (same)
California	CAL. GOV'T CODE §§ 19170
Colorado	COLO. CONST. art. 12 § 13(10); COLO. REV. STAT. § 24-50.125(5); COLO. REV. STAT. § 22-63-103(7) (school employees)
Connecticut	CONN. GEN. STAT. § 5-196(28); § 5-230
Delaware	DEL. CODE ANN. tit. 29, § 5922(a)
District of Columbia	D.C. CODE § 5-105.04 (police officers); § 5-543.01 (police officers and firefighters)
Florida	FLA. STAT. § 110.213(1)
Georgia	GA. CODE ANN., § 45-20-2 (16); § 45-20-6(d)
Hawaii	HAW. REV. STAT. § 76-27(a)(1)
Idaho	IDAHO CODE ANN. § 67-5309(j)

Illinois	55 ILL. COMP. STAT. 5/3-14023 (county employees)
Indiana	IND. CODE § 14-9-8-12; § 36-8-3.5-12(h) (law enforcement employees)
Iowa	IOWA CODE § 8A.413 (8)
Kansas	KAN. STAT. ANN. § 75-2946
Kentucky	KY. REV. STAT. ANN. § 18A.111
Louisiana	LA. REV. STAT. ANN. § 17:446 (school employees)
Maine	ME. REV. STAT. ANN. 5 § 7051; § 30-A § 2701 (municipal and county employees)
Maryland	MD. CODE ANN. STATE PERS. & PEN. § 6-202(1) (school employees); § 11-303 (termination)
Massachusetts	MASS. GEN. LAWS ch. 31, § 34
Michigan	MICH. COMP. LAWS § 38.413(1)
Minnesota	MINN. STAT. § 43A.16
Mississippi	MISS. CODE ANN. §§ 21-31-17; 21-31-65 (municipal employees)
Missouri	MO. REV. STAT. 36.250
Montana	MONT. CODE. ANN. 7-3-4410 (municipal employees)
Nebraska	NEB. REV. ST. § 23-2525(7) (county employees); § 79-828 (school employees)
Nevada	NEV. REV. STAT. § 284.290; § 391.3197 (school employees)
New Hampshire	N.H. REV. STAT. ANN. § 100-A:3 (police); § 21-P:29 (firefighters)

New Jersey	N.J. STAT. ANN. § 19-30E.2 (municipal police)
New Mexico	N.M. STAT. § 22-8E-7 (school employees); N.M. STAT. § 29-2-9 (police)
New York	N.Y. CIV. SERV. § 63
North Carolina	N.C. GEN. STAT. ANN. §§ 96-29, 126-4; 25 N.C. ADMIN. CODE 1C.0404
North Dakota	N.D. CENT. CODE, § 54-44.3-12
Ohio	OHIO REV. CODE ANN. § 124.27(C)
Oklahoma	OKLA. STAT. 74 § 840-4.13(D)-(E)
Oregon	OR. REV. STAT. § 240.316(1)
Pennsylvania	71 PA. CONS. STAT. ANN. § 741.603(a)
Rhode Island	R.I. GEN. LAWS § 36-4-28
South Carolina	S.C. CODE ANN. § 8-17-320(16)
South Dakota	S.D. CODIFIED LAWS § 3-6A-21; S.D. ADMIN. R. 55:01:01:01(26)
Tennessee	TENN. CODE ANN. § 8-30-312
Texas	TEX. EDUC. CODE ANN. § 21.102(b) (teachers); TEX. GOV. CODE ANN. § 411.007(f) (public safety employees)
Utah	1953 UTAH CODE ANN. § 67-19-16; UTAH ADMIN. CODE r.477-5-2(2)
Vermont	VT. STAT. ANN. tit. 3, § 310
Virginia	VA. CODE ANN. § 2.2-2812; VA. CODE ANN. § 22.1-303(A)-(B) (teachers)
Washington	WASH. REV. CODE ANN. § 41.06.133(3)

West Virginia	W. VA. CODE ANN. § 29-6-10(9); W. VA. CODE R. § 143-1-10.1(a)
Wisconsin	WIS. STAT. ANN. § 230.28(1)
Wyoming	006-140-004 WYO. CODE R. § 7